

# Building on #WithWoj

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Recently, a distinguished scholar contributing to [Constitutional Democracy in Crisis?](#) concluded his chapter about a European country as follows: “populisms ... often carry a seed of self-destruction: they are, in the long run, ineffective and counterproductive, relying upon the knowledge (imperfect) and charisma (doubtful) of a single person... By disconnecting the real centre of power from constitutionally established institutions and procedures, the regime reduces the likelihood of self-correction facilitated by inter-institutional accountability. The main legitimating ground of populism – that it effectively delivers the goods to its electorate – seems to have a long-term tendency to decline”. The year: 2018. The case-study: Poland. The author: Wojciech Sadurski.

Although my heart desperately wants to believe him, my head tells me he is too optimistic. Or, put more positively: I would feel less worried if I knew what concerted steps were taken, by whom and at what level, to contain and reverse the rot of the EU's basic principles. If “populists” – for lack of a better word for those politicians who, through their actual actions, move their country into Article 7 TEU territory – clearly have a strategy, we need a counter-populist strategy too. Just days away from a new Commission taking office that proclaims to put rule-of-law protection centre-stage, this may be a good time to suggest some ways forward based on the energy generated by, and experiences with [#WithWoj](#). I suggest there are three elements, and each may be counterintuitive and/or confrontational.

## 1. Wade in, and engage – first and foremost, nationally

It makes sense, right? EU politics takes place in Brussels and Strasbourg, so as concerned activist scholars we should focus our attentions on the ‘Brussels bubble’ to get things moving protection-wise. I hate to break the heart of EU federalists, but that has not been my experience at all, either as a civil servant/EU diplomat or as a(n activist) scholar. Politicians operating in the EU context (both those representing Member States in the Council but also, importantly, Members of the *European* Parliament!) have just one primary loyalty, and that is national. That is, after all, the setting on which they depend for re-election. So that is also where politicians active in an EU setting should be approached and engaged about their record in the EU-setting. Such engagement can take various forms, from op-eds to approaching sympathetic parliamentarians to induce them to use a cause to their own political advantage.

To make this more concrete for building on #WithWoj: Laurent Pech, in his [insightful analysis](#) of how Member States have thus far behaved in Article 7 TEU procedures, demonstrated that remarkably only a handful actually asked questions in these

behind-closed-doors procedures. Apparently, the political cost of this criminal lack of engagement regarding the quality of the rule of law is minimal, nationally. This, to an activist scholar, is crucial strategic information. Rather than just problematize this on an expert blog, concerted parallel national-level actions are required to get traction by having more Member States of the overwhelming rule of law majority actually engage. In particular, it would be helpful for scholars from these Member States to write (national language) op-eds about why the rule-of-law is a crucial issue in that national context too, and why what happens in Poland and Hungary is dangerous to, say, Croatia, Lithuania, etc. National politicians who push such issues nationally can be approached about it too. This is something that can be immediately implemented. The next Article 7 TEU hearing on Hungary will take place on 10 December. Write about it at home! Contrast it to the doubtlessly often repeated rhetorical flourishes about the importance of the rule-of-law, or to national developments. Make it political, nationally.

Different example: consider the good fight [Laurent Pech and Dan Kelemen](#) have been waging to get the [European People's Party](#) (EPP) to live up to expel Viktor Orbán's authoritarian Fidesz. This fight is again focused on the EU level. But that is not where the trigger for change is (in fact, EU-level rules on party funding and the European Parliament Rules of Procedure actually contain the trigger for *maintaining* the problematic *status quo*, because there is a financial and political bonus on size, and therefore a powerful benefit to cuddle political bad apples – see [here](#) and [here](#)). It may be effective if we scholars, right here and right now, agree to press the EPP's unjustifiable position regarding Fidesz in a coordinated way and write letters to or about all national EPP members, and ask them – nationally, in public (op-eds) or private (letters) – why rub elbows with Orbán's henchmen in Brussels when they are explicit about their disdain for everything you defend at home? Why not kick them out when you don't even need them for your majority? (see [here](#)). (The reasoning for the European Conservatives and Reformists Party, and approaching [national ECR member parties](#) about the unreasonableness of dirtying themselves by cooperating with PiS is copy-paste). Newly minted EPP president Donald Tusk will be forced to act if there is a considerable political pro rule-of-law swell of pressure from national EPP member parties.

Does this mean that EU-focused rule-of-law advocacy is irrelevant? No (see next section). But that is not the first place, and at the current stage also not the most important locus to *start* if we want to act on the most important tool available in our good fight, i.e. dramatically increasing the political costs for those part of the rule of law abiding majority for not acting on backsliding. This is a political, not a legal question. If legal arguments were eventually found to save the Euro when that was felt to be politically imperative, similarly legal arguments will be found to save the foundations of Europe. That is Brussels politics.

## 2. Encourage EU-level rule-of-law operators – first and foremost, politically and strategically

On this portal Petra Bárd recently masterfully [described](#) the rule-of-law set-up of the new European Commission. V#ra Jourová and Didier Reynders, both from liberal, rule-of-law minded RENEW, will be the two Commissioners dealing with the rule of law (although EPP Commission president, Ursula von der Leyen, is likely to involve herself actively in this file too). Apart from that, vice-president Dubravka Šuica, holds the related democracy file. The Conference on the Future of Europe she will organise could correct blatant anti-rule-of-law aspects in EU rules concerning party financing (see above). On the European Parliament's side, [Michal Šime#ka](#) of RENEW was appointed to the rule of law file. [Gwendoline Delbos-Corfield](#), a Green MEP, will take over the Hungary/Article 7 TEU file from Judith Sargentini.

It is tempting to continue to pepper these EU-level politicians with detailed advice on their approach. But that again may misread the issue at hand as a hyper-specific and mainly legal problem, whereas in fact it is overwhelmingly political and strategic. For building on #WithWoj it appears better to show our support for those who carry responsibility for rule of law files. We should act #WithV#ra, #WithDidier, #WithDubravka, #WithMichal and #WithGwendoline. They will come under tremendous pressure when trying to move to protect the rule of law. It will therefore be important for them to point to *growing national-level political* backing for their line (that will transpire both through the Council and the Parliament, from the national level up) as well as authoritative 'Brussels bubble' support. Activist scholars can help the hard work of trying to strengthen the former (see above) and provide the latter. This is not an argument for being uncritical of EU-level action. But strategy is about where to focus first, and who to give the benefit of powerful encouragement.

Two final EU-level rule-of-law operators that could benefit from strategic encouragement may be, I suggest humbly, the Commission Legal Service and the European Court of Justice. Involving the institutionally independent Legal Service and equally independent judges in thinking about any "strategy" may be felt as anathema. But no-one will deny that both are most definitely political operators, and in combination arguably the most important rule-of-law protection tandem. And noblesse oblige. So if you are the Legal Service, aware of the fast degradation in Member States facing Article 7 TEU proceedings with all the potential legal spill-over to EU law principles such as mutual recognition, is it not possible to act more swiftly with infringement proceedings? If you are the Court and therefore master of how you handle your own docket, is it really not possible to prioritise these cases, and organise yourself to decide them most expeditiously? Is it really not possible either to *cluster* cases in the sense that when there are both preliminary rulings and infringement proceedings pending relating to the same issue, even if they have trickled in separately, you answer them simultaneously (if only to minimise Member States' potential to spin an outcome of preliminary questions, that are necessarily more limited in nature (see for an unfortunate recent example the [analysis](#) by Barbara Grabowska-Moroz and Jakub Jaraczewski)? Such an approach would

seem fully legal, but also tactically wise and justified by the EU anno 2019. We won't tell anybody it was part of a rule-of-law saving strategy.

### **3. Knowing, owning and turning around (y)our weakness: let's learn how to communicate to convince**

Last but not least: we need to look in the mirror. We need to own our failure to get our rule-of-law points across effectively to those we want to convince, including particularly those who are disillusioned. The brutal fact of the matter is: we are not as good at explaining what we believe in as our opponent is. As [Michael Meyer-Resende](#) recently quoted law professor Marcin Matczak about the debate between Polish legal academics and PiS: "we won the legal discussions, but we lost the public debate". Rule of law idea(l)s don't speak for themselves, perhaps because they are often carefully calibrated compromises. But that doesn't take away the overwhelming necessity for their spokesperson to use much better lines. This is no time for being tongue-tied.

This is something that activist scholars, including those who are #WithWoj but not European, can work on much more consciously. Make it a class assignment to condense specific rule of law principles into tweets, for example. There is, fortunately, increasing attention to this. Thomas Coombes, formerly with Amnesty International, has [written insightfully](#) about effectively communicating about human rights protection. Also the [work about human rights communication](#) by the linguist Anat Shenker-Orsorio is eye-opening – an absolute must-read. Developing a similar guide for rule-of-law communication that is tested to resonate in the public debate is essential. So if you are an EU official working on the rule of law and you are looking to fund something practically useful, here is an idea! I have it on good authority that a certain university in The Netherlands will be happy to host a workshop for interested activist scholars – and to build on #WithWoj in an effort to turn the table on our communicative weakness.

## **Conclusion**

The continuing erosion of the rule of law in some Member States of which the cases against Wojciech Sadurski are such a painful illustration, is far and away the biggest policy and political challenge facing the EU today. Bigger than the future budget, bigger than migration, bigger than the environment, bigger than the desired shape of social, economic or digital Europe. The reason is simple. There is no point wracking your brains about how to (re)build the European house in order to address any of these matters when the very foundations of that house, the institutions and basic procedures that guarantee that it is a community of law with solid liberal democratic foundations, are crumbling. Building on #WithWoj, we need to switch up a gear or two to put up a much better fight to defend and save these idea(l)s. To win that fight, the first victim should be complacent passiveness and eternal reliance on others to

pick up the ball. And to fight that good fight with any chance of traction in the real world, we as activist scholars need a strategy.

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